

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

GREGORY GENE CRITES, et al.

Plaintiffs,

v.

Civil Action No.

5:03-CV-1485 (NAM/DEP)

CANNON EXPRESS CORP., et al.

Defendants.

APPEARANCES:

OF COUNSEL:

FOR PLAINTIFFS:

STANLEY LAW OFFICES
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Syracuse, NY 13202

JOSEPH P. STANLEY, ESQ.
MARGARET DRISCOLL, ESQ.
BRIANNE CARBONARO

FOR DEFENDANTS:

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JOSEPH W. SAVAGE, ESQ.
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140 Broadway
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MICHAEL R. VARBLE, ESQ.

DAVID E. PEEBLES
U.S. MAGISTRATE JUDGE

ORDER

The plaintiffs in this action have moved, pursuant to Rule 37(b) of the Federal Rules of Civil Procedure, for an order precluding defendant Guillermo Mestanza from testifying at trial, and awarding them the costs, including reasonable attorneys' fees, incurred in making the instant motion. Plaintiffs' motion is based upon defendant Mestanza's failure to appear for deposition in the case as required in an order issued by me on February 2, 2005. See Dkt. No. 21.

Oral argument was heard in connection with plaintiffs' motion on June 8, 2005. At the close of argument I rendered a decision from the bench conditionally granting plaintiff's motion and awarding attorneys' fees. Based upon the foregoing and this court's bench decision, which decision is incorporated herein by reference, the court finding that plaintiff will be unduly prejudiced unless a preclusion order is issued, it is hereby

ORDERED as follows:

- 1) Plaintiff's motion for a preclusion order is GRANTED, conditionally. In the event that defendant Guillermo Mestanza fails to appear and make himself available for deposition by plaintiffs' counsel on or before August 31, 2005, he shall be precluded from rendering testimony at the trial in this action.
- 2) Plaintiffs' application for an award of costs and attorneys' fees necessitated by this motion is GRANTED. Within thirty (30) days of the

date of this order, plaintiffs shall file with the court, with proof of service upon defendants' counsel, an affidavit detailing the expenses incurred as a direct result of defendant Mestanza's failure to appear for deposition. Defendants counsel shall have fourteen (14) days from the date of that filing to submit any opposition to plaintiffs' fee application. Thereafter, the court will issue an order awarding plaintiffs the reasonable expenses necessarily incurred as a result of defendant Mestanza's failure to appear for deposition, such award to be rendered as against defendant Guillermo Mestanza only.

3) Copies of this order shall be promptly sent by the clerk to counsel for the parties electronically.

A handwritten signature in black ink, appearing to read "David E. Peebles", is written over a horizontal line.

David E. Peebles
U.S. Magistrate Judge

Dated: June 9, 2005
Syracuse, New York